

but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims.

(2) *Operator name.* An applicant or certificant must ensure that each form submitted under this subpart sets forth in full the correct legal name of the vessel operator to whom a Certificate is to be issued.

(d) *Direct action*—(1) *Acknowledgment.* Any evidence of financial responsibility filed with the Director, NPFC, under this subpart must contain an acknowledgment by each insurer or other guarantor that an action in court by a claimant (including a claimant by right of subrogation) for costs or damages arising under the provisions of the Acts, may be brought directly against the insurer or other guarantor. The evidence of financial responsibility must also provide that, in the event an action is brought under the Acts directly against the insurer or other guarantor, the insurer or other guarantor may invoke only the following rights and defenses:

(i) The incident, release, or threatened release was caused by the willful misconduct of the person for whom the guaranty is provided.

(ii) Any defense that the person for whom the guaranty is provided may raise under the Acts.

(iii) A defense that the amount of a claim or claims, filed in any action in any court or other proceeding, exceeds the amount of the guaranty with respect to an incident or with respect to a release or threatened release.

(iv) A defense that the amount of a claim or claims that exceeds the amount of the guaranty, which amount is based on the gross tonnage of the vessel as entered on the vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except when the guarantor knew or should have known that the applicable tonnage certificate was incorrect.

(v) The claim is not one made under either of the Acts.

(2) *Limitation on guarantor liability.* A guarantor that participates in any evidence of financial responsibility under this subpart will be liable because of that participation, with respect to an

incident or a release or threatened release, in any proceeding only for the amount and type of costs and damages specified in the evidence of financial responsibility. A guarantor will not be considered to have consented to direct action under any law other than the Acts, or to unlimited liability under any law or in any venue, solely because of the guarantor's participation in providing any evidence of financial responsibility under this subpart. In the event of any finding that liability of a guarantor exceeds the amount of the guaranty provided under this subpart, that guaranty is considered null and void with respect to that excess.

(e) *Public access to data.* Financial data filed with the Director, NPFC, by an applicant, certificant, and any other person is considered public information to the extent required by the Freedom of Information Act (5 U.S.C. 552) and permitted by the Privacy Act (5 U.S.C. 552a).

(f) *Total applicable amount.* The total applicable amount is determined as follows:

(1) The applicable amount under OPA 90 is equal to the applicable vessel limit of liability, which is determined as provided in subpart B of this part.

(2) The applicable amount under CERCLA is determined as follows:

(i) For a vessel over 300 gross tons carrying a hazardous substance as cargo, the greater of \$5,000,000 or \$300 per gross ton.

(ii) For any other vessel over 300 gross tons, the greater of \$500,000 or \$300 per gross ton.

(3) The total applicable amount is the applicable amount determined under paragraph (f)(1) of this section plus the applicable amount determined under paragraph (f)(2) of this section.

§ 138.85 Implementation schedule for amendments to applicable amounts by regulation.

Each operator of a vessel described in § 138.15 must establish evidence of financial responsibility acceptable to the Director, NPFC, in an amount equal to or greater than the total applicable amounts determined under § 138.80(f), by not later than January 15, 2009. In the event an applicable amount

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determined under § 138.80(f) is thereafter amended by regulation, each operator of a vessel described in § 138.15 must establish evidence of financial responsibility acceptable to the Director, NPFC, in an amount equal to or greater than the amended total applicable amount, by not later than 90 days after the effective date of the final rule, unless another date is required by statute or specified in the amending regulation.

§ 138.90 Individual and Fleet Certificates.

(a) The Director, NPFC, issues an individual Certificate for each vessel listed on a completed Application or request for renewal when the Director, NPFC, determines that acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, except where a Fleet Certificate is issued under this section or where a Master Certificate is issued under § 138.110. Each Certificate of any type issued under this subpart is issued only in the name of a vessel operator and is effective for not more than 3 years from the date of issuance, as indicated on each Certificate. An authorized official of the applicant may submit to the Director, NPFC, a letter requesting that additional vessels be added to a previously submitted Application for an individual Certificate. The letter must set forth all information required in item 5 of the Application form. The authorized official must also file, or cause to be filed with the Director, NPFC, acceptable evidence of financial responsibility, if required, and must pay all applicable certification fees for the additional vessels.

(b) An operator of a fleet of two or more barges that are not tank vessels and that from time to time may be subject to this subpart (e.g., a hopper barge over 300 gross tons when carrying oily metal shavings or similar cargo) may apply to the Director, NPFC, for issuance of a Fleet Certificate, so long as the operator of such a fleet is a self-insurer or arranges with an acceptable guarantor to cover, automatically, all such barges for which the operator may from time to time be responsible.

(c) A person must not make any alteration on any copy of a Certificate issued under this subpart.

(d) If, at any time after a Certificate has been issued, a certificant becomes aware of a change in any of the facts contained in the Application or supporting documentation, the certificant must notify the Director, NPFC, in writing within 10 days of becoming aware of the change. A vessel or operator name change or change of a guarantor must be reported by the operator as soon as possible by telefax or other electronic means to the Director, NPFC, and followed by a written notice sent within 3 business days. (See, § 138.45, Where to apply for and renew Certificates, for contact information).

(e) Except as provided in § 138.90(f), at the moment a certificant ceases to be the operator of a vessel for any reason, including a vessel that is scrapped or transferred to a new operator, the individual Certificate naming the vessel is void and its further use is prohibited. In that case, the certificant must, within 10 business days of the Certificate becoming void, submit the following information in writing to the Director, NPFC:

(1) The number of the individual Certificate and the name of the vessel.

(2) The date and reason why the certificant ceased to be the operator of the vessel.

(3) The location of the vessel on the date the certificant ceased to be the operator.

(4) The name and mailing address of the person to whom the vessel was sold or transferred.

(f) In the event of the temporary transfer of custody of an unmanned barge with a Certificate under this subpart, where the certificant transferring the barge continues to be liable under the Acts and continues to maintain on file with the Director, NPFC, acceptable evidence of financial responsibility with respect to the barge, the existing Certificate remains in effect in respect to that vessel, and a temporary new Certificate is not required for the vessel. The temporary transferee is encouraged to require the transferring certificant to acknowledge in writing that the transferring certificant agrees